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Supreme Court of the United States

October Term, 1942

No. 427

WILLIAM H. BICKLEY, Individually and Doing Business as BICKLEY'S AUTO EXPRESS,

Petitioner,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent.

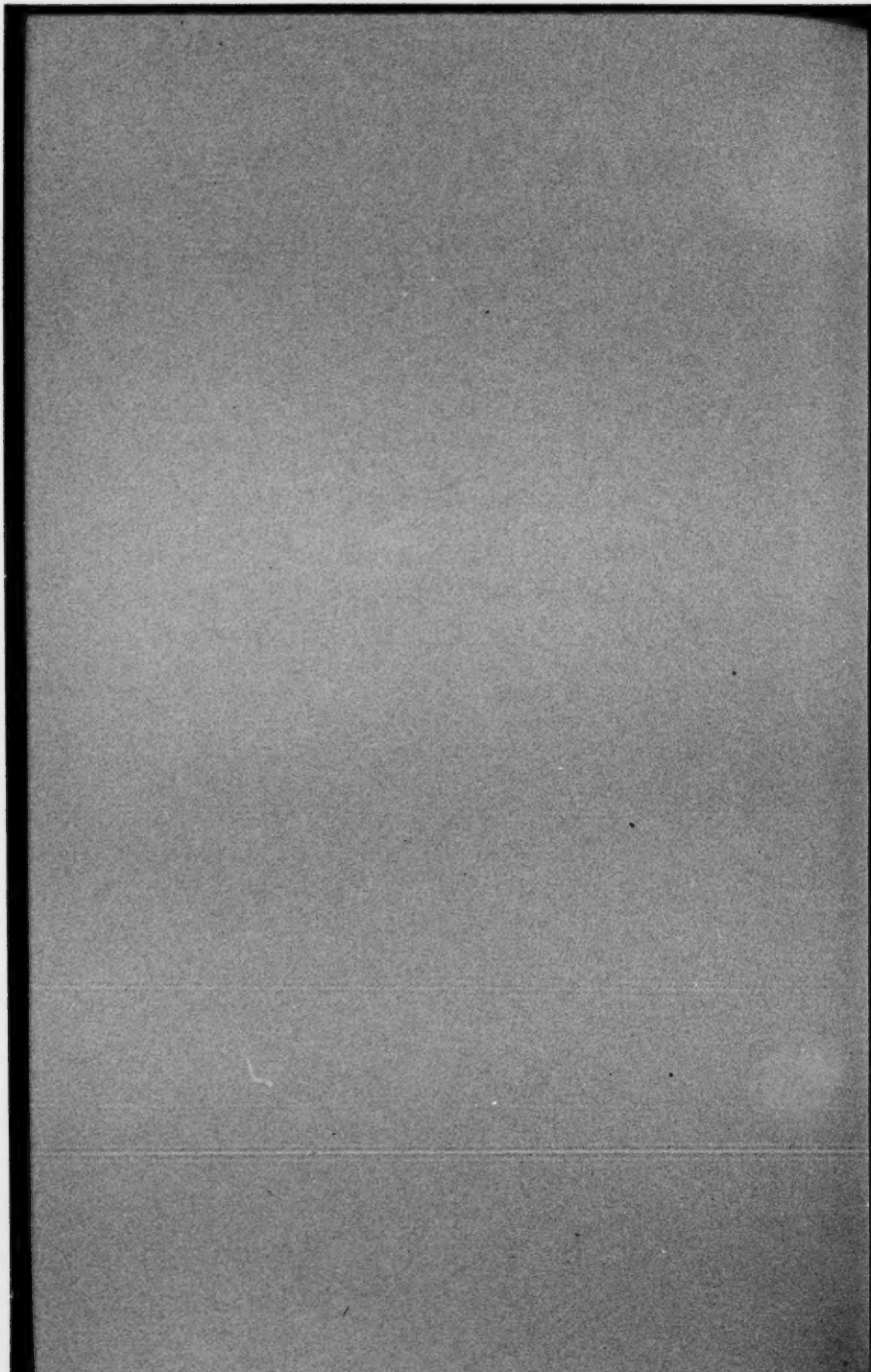
BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLAUDE T. RENO,
Attorney General of Pennsylvania

FREDERICK L. KIGER,

HARRY M. SHOWALTER,
Counsel.
For Pennsylvania Public Utility Commission

North Office Building,
Harrisburg, Pennsylvania.



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OPINION OF THE COURT BELOW

The opinion of the Superior Court of Pennsylvania may be found in the Record in this case at page 69. It is officially reported in 148 Pa. Superior Ct. 399; 25 Atl. (2nd) 589 and printed as an appendix hereto.

ARGUMENT

I.

GENERAL

The Petition for Writ of Certiorari filed by William H. Bickley, does not contain a summary and short statement of the matters involved; does not contain a statement particularly disclosing the basis upon which it is contended that the Honorable Court has jurisdiction to review the decision in question (Rule 12, par. 1); does not present the questions involved, and sets forth no specific reasons relied on for the allowance of the writ (Rule 38, par. 2).

Petitioners failure to do this places respondent under the disability of being unable to categorically oppose the merits of the petition. Consequently, we delineate an opposition only to those portions of the petition deemed cogent by the exigencies of the case.

The opinion of the court below in *Bickley, Appt., v. Pennsylvania Public Utility Commission*, 148 Pa. Superior Ct. 399; 25 A 2d 589, not only concisely depicts the historical facts involved, but also sets forth the applicable law. The opinion, upon which respondent desires to submit its case, is printed in toto as an appendix hereto.

II.

THE ISSUES PURSUED BY PETITIONER ARE RES JUDICATA

Petitioners former appeal, taken seasonably under the appropriate provisions of the Public Utility Law of Pennsylvania, 1937 P. L. 1053; 66 P. S. 1101 et seq, from the order of the Pennsylvania Public Utility Commission, raised all the

pertinent issues involved in an appeal from the order of an administrative tribunal.

On April 28, 1939, the Superior Court of Pennsylvania affirmed the order of the Commission in *Bickley, Appelant, v. Pennsylvania Public Utility Commission,* 135 Pa. Superior Ct. 490; 5 Atl. 2d 806. On October 1, 1940, Petitioner filed a Bill in the Court of Common Pleas of Dauphin County sitting In Equity seeking to enjoin enforcement of the Commission's Order which had been affirmed by the Superior Court at the above citation. His bill was dismissed upon preliminary objections thereto and he again appealed to the Superior Court in that decision. In the opinion of the Superior Court therein (See Appendix) the Court affirmed the decree of the Dauphin County Court on the ground, inter alia, that the case was res judicata as exemplified on the face of the bill.

The well founded doctrine of res judicata or estoppel by judgment proceeds on the theory that a party litigant or his privies cannot raise again issues of the law or fact that have been once determined on the merits by a court of competent jurisdiction. See *Sunshine Coal Co. v. Adkins,* 310 U. S. 381; 84 L. Ed. 1263; *U. S. v. California Bridge and Construction Company,* 245 U. S. 337; 62 L. Ed. 333 and cases cited.

Petitioner's application to the Supreme Court of Pennsylvania for the allowance of an appeal from the ruling of the Superior Court was denied per curiam without written opinion. (Record, p. 81) The absence of an opinion by the Supreme Court does not affect the quality of its decision or detract from its efficiency as a judgment upon the questions presented and its subsequent conclusive effect upon the rights of the petitioner. *Napa Valley Electric Company v. Railroad Commission of California,* 251 U. S. 366.

III.

PETITIONER CANNOT NOW RAISE QUESTIONS OF LAW OR FACT WHICH WERE AVAILABLE TO HIM, BUT WHICH HE NEGLECTED TO RAISE IN THE COURT BELOW.

In paragraph 11 of the Petition for Writ of Certiorari, petitioner contends for favorable discretionary action by this Honorable Court on the ground that the matter in equity " * * * raised questions of fact and questions of law and constitutional questions as stated above which were not raised in the 1936 proceedings * * * ". Petitioner alleged below that the principles of res judicata cannot apply because his former counsel failed to raise the constitutional questions in the cases before the Superior Court (Record, pp. 37, 47). It should be noted that the so called "1936 proceedings" involved the propriety of the order of the Pennsylvania Public Utility Commission, and that petitioner took an appeal from that order to the Superior Court of Pennsylvania. Petitioner therefore, had his day in court with ample opportunity to present *all* questions of law, fact or constitutionality. By asserting them now, he is attempting to arrogate the principles of res judicata which extend not only to those issues which were actually adjudicated, but also to those which might have been raised, *Grubb v. Public Utility Commission*, 281 U. S. 470. In that case closely analagous to the case at bar, Justice Van Devanter said at pages 478 and 479:

> The thing presented for adjudication in the case in the state courts was the validity of the order, and it was incumbent on the appellant to present in support of his assserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. *Werlein v. New Orleans*, 177, U. S. 390, 398, *et seq.; United States v. California and Oregon Land Co.*, 192 U. S. 355, 358.

"As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 319; *United States v. Moser*, 266 U. S. 236, 241; *Cromwell v. County of Sac*, 94 U. S. 351, 352."

IV.

PETITIONER HAS VIOLATED THE MAXIM THAT A LITIGANT MUST COME INTO EQUITY WITH CLEAN HANDS.

In paragraph 5 of Petition for Writ of Certiorari, William H. Bickley boldly admits that he had violated, and still continues to violate the Commission Order, the effect of which he sought to restrain. His language is as follows: "Your petitioner has refused, and still refuses to obey said order contending that said order is illegal and unconstitutional in its operation * * * ".

The tenet that he who comes into equity must come with clean hands contemplates inaction rather than action on the part of the court, and means that equity will refuse to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the manner in which he seeks relief. See *Danciger v. Stone*, 187 Fed. 853; *American Insurance Company v. Lucas*, 38 Fed. Supp. 926.

CONCLUSION

It has been demonstrated that for the foregoing reasons viewed in conjunction with the complete opinion of the court below, set forth in the appendix hereto, that under the law and the facts we respectfully urge your Honorable Court to deny the prayer of the Petition for Writ of Certiorari.

Respectfully submitted,

CLAUDE T. RENO,
Attorney General of Pennsylvania

FREDERICK L. KIGER,

HARRY M. SHOWALTER,
Counsel.
For Pennsylvania Public Utility Commission

North Office Building,
Harrisburg, Pennsylvania.